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No. 10-136

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Supreme Court, U.S.
FILED
SEP 8 - 2010
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In the Supreme Court of the United States

ROBERT HOREL, WARDEN, *Petitioner*,

v.

FELIX SOLORIO VALDOVINOS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether AEDPA deference applies to the state supreme court's summary denial of a claim under *Brady* v. *Maryland*, 373 U.S. 83 (1963). See *Harrington* v. *Richter*, 130 S. Ct. 1506 (2010) (No. 09-587).

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ARGUMENT

I. VALDOVINOS FAILS TO SHOW THAT THE COURT OF APPEALS DEFERENTIALLY REVIEWED THE *BRADY* CLAIM SUMMARILY REJECTED BY THE STATE SUPREME COURT.

In *Harrington* v. *Richter*, 130 S. Ct. 1506 (2010), 09-587, this Court is considering whether AEDPA (28 U.S.C. § 2254(d)) requires deferential review of a state court's summary disposition. This case raises the same issue. Valdovinos presented to the state supreme court in a state habeas petition an expanded version of the claim he had raised in the lower state court under *Brady* v. *Maryland*, 373 U.S. 83 (1963). The state supreme court summarily denied the claim. As documented in the State's petition (Pet. 11-13), the Ninth Circuit reversed the district court and granted the writ by failing even to consider (much less to deferentially review) the summary denial.

Valdovinos says the Ninth Circuit did apply deference to the state supreme court's decision. He offers three main arguments. None has merit.

A. The Remark of One Judge at Oral Argument Does Not Show that the Ninth Circuit Panel Applied Deferential Review to the State Supreme Court's Decision.

Valdovinos cites Judge Kleinfeld's statement at oral argument: "'I would find this a lot easier to reverse on *Brady* grounds if it was a direct appeal, but it's AEDPA deference which really concerns me.' [Citation]." Opp. 5; see Opp. 13. But statements at oral argument do not establish the considered opinion of the speaker, let alone of the court. See *Board of Trade of City of Chicago* v. *S.E.C.*, 883 F.2d

525, 530 (7th Cir. 1989). This Court reviews the judgment, not the oral argument.

Valdovinos observes that "Judge Kleinfeld specifically signed the dissent in Richter v. Hickman, 578 F.3d 944 (9th Cir. 2009) (en banc) which argued that insufficient deference was given the State Court opinion." Opp. 13-14. Valdovinos does not explain the relevance of the asserted fact. Perhaps he means to show that Judge Kleinfeld knows the difference between deference and non-deference. See Opp. 13. That fact, too, does not show that the Ninth Circuit actually applied the § 2254(d) deference standard to the state supreme court's decision in this case.

B. The Ninth Circuit's Recitation of the § 2254(d) Deference Standard Does not Show that the Court Applied It to the *Brady* Claim Rejected by the State Supreme Court.

Valdovinos observes that the opinion of the Ninth Circuit recites the deference standard. Opp. 6 (citing App. 14a). He fails to recognize that the circuit court applied that standard only to claims decided by the state appellate court, not the supreme court.

With respect to the former, the court used the language of deference. App. 20a ("Here, the appellate court found that further impeachment of Lopez would not have affected the trial or outcome. On its own, this finding is neither contrary to nor an unreasonable application of established federal law."); App. 24a ("Therefore, we affirm the district court's finding that the state court's decision [rejecting an ineffective assistance claim] was neither contrary to federal law nor an unreasonable application of the law to the facts. [Footnote

omitted.]"). By contrast, the opinion makes no mention of deference with respect to the claims Valdovinos presented to the state supreme court. App. 16a-19a, 20a-22a. The Ninth Circuit held as to those claims. "The prosecution's repeated failure to disclose evidence favorable to the defense leads us to conclude that Valdovinos did not receive a fair trial resulting in a verdict worthy of confidence." App. 22a.

The Ninth Circuit explicitly mentioned the state supreme court's decision only in the procedural history of the opinion. App 8a, 9a. A later passage states cryptically that a summary denial requires "an independent review of the record. [Citation omitted.]" App 14a By using the language of deference to review the claims decided by the state appellate court but not the state supreme court, and by not even mentioning the state supreme court's decision in any substantive way, the Ninth Circuit made clear that it was not deferentially reviewing that decision, if reviewing it at all.

In any event, the circuit court's recitation of an applicable legal standard does not by itself establish that the court actually applied that standard. See *Wong* v. *Belmontes*, 558 U.S. ___, 130 S. Ct. 383, 390 (2009) (per curiam) ("While the Court of Appeals quoted the pertinent language from *Strickland*, that court elsewhere suggested it might have applied something different."); *Brown* v. *Payton*, 544 U.S. 133, 140 (2005) (Ninth Circuit "purported to decide the case under the deferential standard AEDPA mandates"); *id.* at 147 (Ninth Circuit erred when it "made the . . . assumption" that the state supreme court acted unreasonably in rejecting the claim); *Schad* v. *Ryan*, 606 F.3d 1022, 1030 n.2 (9th Cir. 2010) (Callahan, J., dissenting) (collecting cases in

which this Court has found that the Ninth Circuit applied AEDPA deference incorrectly, if at all).

C. The Panel's Discussion of the District Court's Opinion Does not Show that It Applied the Deference Standard to the *Brady* Claim.

Valdovinos says petitioner "attempt[s] to expand the panel's discussion about the standard of review it used to examine the federal district court's opinion to imply that the panel used the same standard . . . to examine the California Supreme Court's decision. . . ." Opp. 6. Valdovinos says petitioner's purported argument "is simply not supported by the language of the panel opinion, and in fact is contradicted by [it]. . . ." Opp. 6. Valdovinos's response lacks citation to either our petition or the opinion below. Petitioner has not suggested that the Ninth Circuit's application of de novo review to the district court's opinion means that the Ninth Circuit applied de novo review to the state supreme court's decision.

Because the Ninth Circuit did not apply deference to the state supreme court's summary disposition, *Richter* controls this case. As shown in the petition (Pet. 14-23) and below, deferential review would compel the Ninth Circuit to reverse its decision granting the writ.

II. DEFERENTIAL REVIEW WOULD REQUIRE THE COURT OF APPEALS TO REJECT THE CLAIM.

Valdovinos says, "the *Brady* errors in this case were substantial and undermine confidence in the verdict[.]"[1] Opp. 6. He is wrong in every case.

A. The Anonymous Letter

On March 30, 2004, associate habeas counsel found an anonymous letter in a file in the police department. App. 71a; ER 127-128. The writer of the letter disclaimed responsibility for the shooting and said Ramon Balemas ordered it. App.71a-72a; ER 150-151. An envelope attached to the letter was addressed to "Eulalio Caballero" and postmarked October 2, 1998. ER 154 The trial began in November 1998. CT 139. There is no indication in the record of how or when the letter reached the police file.

The Ninth Circuit found the letter's nondisclosure prejudicial because it "denied the defense important investigative opportunities. . . ."

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[1] Valdovinos accuses petitioner of distorting the record and misunderstanding *Brady* Opp. 7 It is only Valdovinos who has done so To take just one example beyond those addressed in the text, Valdovinos states "We now know that Lopez admitted to Juan Ledezma that he had done the shooting and had placed the blame on Valdovinos See, e g , App. 111a " Opp 3 We would "know" that only if we chose to ignore, as Valdovinos does, the evidence in the record (summarized at Pet 7), the findings of the district court (App. 74a-75a), and even the determinations of the Ninth Circuit (App 16a) Valdovinos's sole support for his statement is the part of his own state habeas petition in which he makes the same unsubstantiated and unreliable assertion App 112a-113a

App. 19a. The court overlooked the facts that (1) Valdovinos himself or someone on his behalf could have written the letter, (2) trial counsel never said he was unaware of the information, (3) the court did not identify any "important investigative opportunities" the defense lost from the nondisclosure, Pet. 16-17, and (4) the defense never established even that the prosecution possessed the letter at the time of trial. Pet. 17 n. 6.

Valdovinos responds: "Under the Attorney General's argument, there could never be a reversal for failure to disclose *Brady* information, as long as there was a theory, no matter how preposterous, that under some theoretical set of facts, not supported by the record, the undisclosed material might not be exculpatory." Opp. 7. Unburdened by record citation or authority, Valdovinos's argument fails to explain what is "preposterous" about any of petitioner's points. Counsel said only that he did not become aware of the letter until the defense investigator showed it to him in 2004. ER 157. Counsel said *nothing* about its contents or what he already knew at trial about a "drug killing." Such silence is telling because it is well established that no *Brady* violation occurs if counsel knew of the suppressed information or even if he could have learned it on his own. Pet. 16-17 (cases cited). Rather than defend counsel's studiously unrevealing declaration, Valdovinos ignores it.

Valdovinos writes, "Instead of turning that material over, as required by *Brady*, the prosecution buried the letter and allowed its witnesses to falsely claim that the prosecution had no evidence that this was a drug-related murder." Opp. 8. The argument fails because it assumes that the prosecution possessed the letter at the time of trial. Valdovinos

fails to rebut the State's explanation of why that assumption is unwarranted. Pet. 17 n.6.

Stressing testimony from prosecution witnesses and argument from the prosecutor that no evidence showed the killing to be drug related, Valdovinos says the letter would have discredited that argument. Opp. 8-9 But Valdovinos ignores the fact that defense counsel effectively rebutted the argument without the letter, arguing to the jury that the victim was a drug dealer and drug user and that Lopez was an armed drug dealer. App. 73a-74a (district court's opinion). Regardless, Valdovinos himself acted exactly like a "hit man" in a drug killing. Pet. 22. For that reason as well, additional evidence that the killing was a drug killing would not have helped him. Likewise, the letter was not material evidence, so its nondisclosure entitled Valdovinos to no relief under *Brady*.

B. The Mongia Photograph

The State explained that Valdovinos never established that the prosecution failed to disclose the photograph showing Jose Mongia in a cowboy hat. Pet. 15. Valdovinos responds by claiming that, in the state appeal, the State incorrectly argued and the state appellate court incorrectly found that only Valdovinos had worn a cowboy hat. Opp. 9. Valdovinos takes these comments out of context. But it is unnecessary to address them further because his argument fails regardless. Arguments or remarks in the state appeal about the significance of the shooter wearing a cowboy hat say nothing about the evidence disclosed to the defense at trial. If the prosecution had not disclosed the Mongia photograph, trial counsel would have said so in his declaration in support of Valdovinos's habeas traverse, just as counsel said the prosecution never disclosed the

anonymous letter blaming Balemas for the killing. ER 157. Valdovinos ignores this point. So did the Ninth Circuit.

Seeking to rebut the State's demonstration that the Mongia photograph added nothing of significance, Valdovinos says the photo showed that he was not the only one wearing a cowboy hat. Opp. 10. Valdovinos ignores the undisputed evidence at trial showing the same thing. Pet. 15. He also ignores the fact that none of the three persons who identified him as the shooter did so because he was wearing a cowboy hat. Pet. 15. If anything, they made the identifications in spite of that fact. Pet. 15. Because it made no difference that the shooter wore a cowboy hat, the Mongia photo made no difference either.

C. The Photo Lineups

The Ninth Circuit said "[t]he photo lineup evidence rendered the [in-court eyewitness] identifications questionable." App. 21a. By assessing the in-court identifications in light of the photo lineups themselves, the Ninth Circuit incorrectly assumed that the jury had been unable to assess the identifications in that way, when in fact the jury *was* able to do so because the prosecution disclosed the lineups at trial, albeit belatedly. Pet. 18. Noting that an instruction had drawn the jury's attention to the untimely disclosure and that defense counsel excoriated the police about it, the State's petition explained how the belated disclosure may actually have helped the defense. Pet. 19.

Valdovinos says that the State's argument is "not based on the record or the Ninth Circuit opinion which specifically describes the belated[ly] disclosed exculpatory photo lineups as 'suppressed evidence revealed during trial.' App. 19a." Opp. 10-11. He is mistaken. The Ninth Circuit did not describe the

photo lineups as "suppressed evidence revealed during trial." The court applied that description to the gun and drugs found in Lopez's apartment. App. 19a. In any event, the Ninth Circuit's analysis (such as it was) was consistent with nondisclosure, rather than belated disclosure (as explained above), so whatever description the court may have used at an earlier part of its opinion is irrelevant.

Valdovinos says the belated disclosure "prevented any opportunity for an independent line-up, or even cross-examination, to check specific recollections at a blackboard preliminary hearing." Opp. 11 The district court rejected this argument. App. 68a-69a. It observed that Valdovinos "does not state how he could have more effectively cross-examined either Diaz or Castro than he did at the trial[,]" App. 68a, and he "does not explain how knowing of the photo lineups would have helped him obtain a blackboard preliminary hearing; his argument for the blackboard hearing was based upon his assumption that neither Castro nor Diaz had seen a photo lineup," App. 69a. The district court also found that the record "belied" Valdovinos's contention that "the witnesses' identification of him at the preliminary hearing were tainted by the undisclosed photo lineups. . . ." App. 69a The Ninth Circuit did not dispute any of these district court findings. Valdovinos ignores those findings and their tacit acceptance by the Ninth Circuit. Likewise, he fails to show that the state courts unreasonably resolved the claim against him.

D. Lopez's Gun and Drugs

The Ninth Circuit accepted the state appellate court's holding that the belated disclosure of Lopez's gun and drugs was not a *Brady* violation in itself. App. 20a. However, the Ninth Circuit said that "the

failure to disclose the gun and drugs found in Lopez's possession . . . only further solidifies our finding of collective prejudice." App. 22a. The State pointed out that the Ninth Circuit "appears to have considered the belated disclosure of the evidence at trial as if the evidence was never disclosed" and failed to explain how the error "solidifie[d]" prejudice. Pet. 21.

On the first point, Valdovinos again accuses the State of "ignor[ing] the panel's description of this information as 'suppressed evidence revealed during trial' (App. 19a). . . ." Opp. 12. The State ignored that language because the Ninth Circuit did, too, when it actually analyzed the error. At that later point, the court described the error as "the failure to disclose the gun and drugs. . . " App 22a. Notwithstanding its earlier description, then, the court lost sight of what the alleged *Brady* error actually was. By failing to explain how the belated disclosure added prejudice, the court made only more clear that it misunderstood the nature of the error.

Valdovinos argues that the belated disclosure at trial prevented the defense from using information about the drugs and gun to cross-examine Lopez, who absconded after testifying at the preliminary hearing. Opp. 13-14. The state appellate court (App. 99a), the district court (App. 70a), and the Ninth Circuit (App. 20a) all rejected this argument. As indicated by those courts, defense counsel's argument to the jury about the favorable treatment Lopez received from law enforcement after the discovery of the gun and drugs was no less effective than anything defense counsel would have said to the jury if he had been able to confront Lopez with the gun and drugs at the preliminary hearing. Valdovinos ignores the unanimity of opinions on the point. He

fails to show the state courts acted unreasonably in rejecting his arguments.

CONCLUSION

The petition for certiorari should be granted.

Dated: September 8, 2010

Respectfully submitted

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